No. 44692-8-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

TODD BROOKS,

Appellant,

vs.

ZEECHA BROOKS (nka VANHOOSE),

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Mr. BROOKS, Appellant father, contends that the trial court erroneously modified aspects of the parties' parenting plan which had no nexus to the Respondent mother's relocation. This brief will address the arguments made by ZEECHA BROOKS (nka VANHOOSE) in the Brief of Respondent.

II. MODIFICATIONS BASED ON RELOCATIONS

Respondent makes four (4) arguments with regard to the Appellant father's claims regarding the parenting plan: 1) That the claim is frivolous; 2) that relocations permit any and all modifications to a parenting plan; 3) that no change of circumstances is required for the court to modify a parenting plan due to a relocation and 4) that the parenting plan ordered by the trial court does maintain the continuity of the parenting plan. These arguments fail and must be rejected.

A. The Appellant Father's Claim is Not Frivolous.

The Appellant father's claim has never been resolved by any known case law, presents issues which are all too frequent in family law matters and resolution of the father's appeal will resolve an issue of substantial public importance for all families faced with a relocation of one party closer to the other.

1. The Appellant father's claim presents debatable issues of public importance with little guidance based on current case law.

While the Respondent's brief declines to call this matter one of first impression, as noted by the trial judge, it also declines to point to any case which resolves the issue of how a court should treat parties relocating closer to one another or relocations where there is no practical change of circumstances. RP 51-52, 57.

"An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal." *Lutz Tile, Inc. v. Krech,* 136 Wash.App. 899, 906, 151 P.3d 219 (2007), *review denied,* 162 Wash.2d 1009, 175 P.3d 1092 (2008). Further, all doubts as to whether an appeal is frivolous are resolved in favor of the appellant. *Id.* "An appeal that is affirmed merely because the arguments are rejected is not frivolous." *Kinney v. Cook*, 150 Wash. App. 187, 195-96, 208 P.3d 1, 5 (2009) citing *Halvorsen v. Ferguson,* 46 Wash.App. 708, 723, 735 P.2d 675 (1986). "Cases of first impression are not frivolous if they present debatable issues of substantial public importance." *Olson v. City of Bellevue*, 93 Wash.App. 154, 165-66, 968 P.2d 894, 900 (1998) citing *Cary v. Allstate Ins. Co.*, 78 Wash.App.

434, 440-41, 897 P.2d 409 (1995), A*ff'd*, 130 Wash.2d 335, 922 P.2d 1335 (1996). Raising at least one debatable issue precludes finding that the appeal as a whole is frivolous. *Advocates for Responsible Dev. v. W. Washington Growth Mgmt. Hearings Bd.*, 170 Wash. 2d 577, 580, 245 P.3d 764, 766 (2010).

The facts of the case, parties relocating closer to one another, are not "odd facts" as claimed by the Respondent but in fact common facts which are the result of an increasingly mobile society. BR 9. This fact pattern is likely repeated hundreds of times a year with little to no guidance in the form of case law. The trial court specifically expressed that there was no guidance for the court on issues such as this. RP 51-52, 57.

2. The father's claim to maintain his mid-week summer and extra "floating" visitation with his child is not frivolous.

The Respondent next attempts to claim the appeal is frivolous based on a consolidation of the father's weekly visits into "2.5 days" and largely ignoring the other reductions in the father's time. BR 7. Additionally, the Respondent appears to claim the father was not awarded summer mid-week visits in the 2010 plan but this is contrary to the plain language of both 2010 plans. (CP 11 § 3.2, 3.5, CP 19 § 3.13.) This argument holds no merit. Statutes and common sense support the

contention that parent/child relationships should be fostered and maintaining a consistent pattern of visits helps to ensure a child's bond to both parents. Basic policy as statutorily outlined supports this contention.

> [T]he best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated ...

Wash. Rev. Code § 26.09.002.

> The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances.

Wash. Rev. Code § 26.09.187.

Taken to its logical extreme, Respondent's argument would state that so long as time is equal, it does not matter if a visit occurs at 4:00 a.m. or 4:00 p.m. or that a parent's nightly five (5) minute phone call with a child is the same as a single day in the summer. This argument is sadly designed to minimize the importance of the father's relationship with his son.

The reality of a mobile society is that parents will relocate often; sometimes farther away (causing the vast bulk of challenges and appeals) and sometimes closer to one another. Case law is silent as to the logical outcomes of parties relocating closer to one another and established case

law to answer this void will provide the trial court with the direction it was seeking in this case and many others.

B. Modifications Due to Relocations Should Accommodate the Relocation, not Create a "Free-for-All" on All Parenting Provisions.

Case law and statutes support the contention that parenting plans are not to be changed without good reason. "[T]he best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated. . ." Wash. Rev. Code § 26.09.002. The underlying basis for a change to the parenting plan due to a relocation is based on the assumption that a change is necessitated. *Id.*, Wash. Rev. Code § 26.09.405 *et sec.* The overarching principle is that changes can and should be made to accommodate the relocation and presumed practical problems that result from the relocation.

In this case, the Respondent's theory is that a relocation creates a "free for all" as to the parenting plan, meaning that all provisions may be changed. This contention is also without merit. Statutes clearly favor consistency, continuity and predictability in parenting plans. If the Respondent's argument is accepted, then a move across the street would open the door to a major modification of the parenting plan without any

other basis for doing so. Clearly, this is an absurd result but one the Respondent is asking the court to affirm.

There must be a reasonable nexus between a relocation and a change to a parenting plan. The court can and should accommodate necessitated changes based on a relocation but should not allow changes based on simple desire of one parent to change extraneous provisions.

C. The Obligation to Maintain the Continuity of the Parenting Plan Outweighs the Convenience of One Party.

Respondent argues that relocations permit adjustments to the parenting plan but never argues that the changes made in this case were related to the relocation or that the 2010 Plan was not in the child's best interest. The statutory preference for continuity remains, and "[t]he court must still find that modification is 'necessary to serve the best interests of the child[ren],'" *In re Marriage of Timmons*, 94 Wn.2d 594, 599, 617 P.2d 1032 (1980) (alteration in original) (quoting former RCW 26.09.260(1) (1973). "[C]ontinuity of established relationships is a key consideration." *McDaniels v. Carlson*, 108 Wash. 2d 299, 312, 738 P.2d 254, 262 (1987). The court and statutes consistently give preference to maintaining stability and consistency for a child. Modifications must be in a child's best interests, regardless of statutory reason which allows the modification.

The Respondent does not deny that the basis for her request in the reduction of the father's time was because the Appellant father already had a "generous schedule" with the child, the Wednesday visits were "not necessary" and she wanted the court to "adopt a plan which is more like a normal parenting plan." (Clerk's Papers 49, page 6, 15-18 and page 4, 5-6.) Her arguments are ones of pure connivance, not based on the best interest of the child.

Continuity must always outweigh mere convenience when the court considers the best interests of the child. Modifying a parenting plan for simple convenience or a desire for the norm does a grave disservice to parents and children. The trial court erred in modifying the parenting plan with little more than the Respondent's stated desire for convenience.

D. A Nexus Between the Practical Circumstances of the Parties and the Changes to the Parenting Plan is a Necessary Element to Modifications, Regardless of the Statutory Basis for the Modification.

The statutory guidelines generally outline two reasons which substantiate a need to modify a parenting plan; (1) a substantial change of circumstances and (2) some lesser reason which still results in the need for a practical change to the parenting plan. Wash. Rev. Code § 26.09.260; 26.09.405 *et sec.* The common ground in the statutory scheme is that

plans are only changed by necessity. Courts have previously considered the nonresidential parent's relocation closer to a child a "factor for the court to consider in terms of a circumstance that enhances access for the benefit of both the child and the visiting parent." *In re Marriage of Hoseth*, 115 Wash. App. 563, 573, 63 P.3d 164 (2003). In that case, the court still used the basic "substantial change in circumstances" framework but found that a move closer should result in expanded, not reduced, time for the nonresidential parent. There was a nexus between the practical situation of the parties and the changes to the parenting plan made by the court.

The Respondent's requested changes have no nexus to her relocation and in fact ignore that a relocation geographically closer should result in an expansion of time for the nonresidential parent. If the Respondent had requested her modification under a basis other than relocation, it is likely that she would have been quickly denied as her reasons for reducing the father's time (father's time too "generous", "not necessary" and to have a "normal parenting plan") are not statutory reasons to modify a parenting plan. Changes to parenting plan must be rooted in some change to the parties or child which needs to be accommodated. As there is no change in the case at bar (except a minor

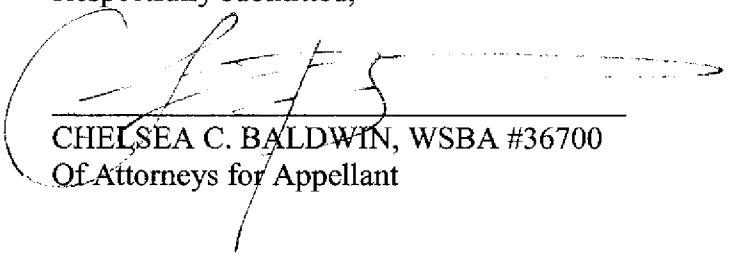
reduction in the transportation obligation) no change to the parenting plan is warranted.

III. CONCLUSION

Appellant respectfully requests that the trial court be reversed and remanded to restore the Appellant father's residential time.

DATED: October 15, 2013.

Respectfully submitted,



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CERTIFICATE

I certify that on this day I caused a copy of the foregoing Brief of Appellant to be served by email (per agreement) to Respondent's attorney at the following address:

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WALSTEAD MERTSCHING

October 15, 2013 - 3:45 PM

Transmittal Letter

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